IN THE SUPREME COURT OF MISSOURI

SC 93092

STATE EX REL RAYMOND SKIRVIN,

Respondents,

v.

CLINT ZWEIFEL,

MISOSURI STATE TREASURER,

Appellant.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Patricia Joyce, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Respondent is dissatisfied with Appellant's jurisdictional statement because it contains argument. Missouri Constitution art. V, section 3, grants jurisdiction to the Missouri Court of Appeals because this case does not involve subject matter within the exclusive jurisdiction of the Missouri Supreme Court. Territorial jurisdiction is within the W.D. Court of Appeals pursuant to §477.070 RSMo. The Missouri Court of Appeals, Western District, transferred this case to the Supreme Court of Missouri pursuant to Rule 83.02, after each judge in the three-judge panel authored a decision.

STATEMENT OF FACTS

Respondent sought permanent total disability benefits from the Second Injury Fund because of the combination of disabilities from an injury at work on May 20, 2006 to his neck and right upper extremities and pre-existing disabilities. (L.F. p. 07).

Respondent's primary work-related injury resulted in a settlement against his employer for 15% permanent partial disability of the body as a whole in reference to an aggravation of Respondent's cervical spine syndrome. (L.F. p. 13). Respondent's pre-existing medical conditions and disabilities included aggravated lumbar syndrome and chronic lumbar syndrome secondary to disc bulging at L3-4, L4-5 and L5-S1 with discogenic pain; chronic cervical syndrome secondary to disc bulging at C5-6 with protrusion to the right, as well as C6-7 and foraminal narrowing at C3-4 and C4-5 causing intermittent right upper extremity radicular symptoms; right shoulder internal derangement, including massive rotator cuff tear, degenerative arthritis and impingement; left shoulder derangement; right thumb interphalangeal joint fracture/ dislocation complicated by infection; bilateral mild carpal tunnel syndrome; right knee patellofemoral syndrome; and, right ankle degenerative arthritis and lateral compartment strain syndrome. (L.F. pp. 21-22).

Based on medical and vocational opinions, the Labor and Industrial Relations Commission (LIRC) found Respondent to be permanently totally disabled due to the combination of his preexisting disabling conditions and the disability from the primary injury pursuant to Section 287.220. (L.F. p. 13). Fifteen percent permanent partial disability was attributed to the primary injury, or 60 weeks of disability. (L.F. p. 15).

Accordingly, against the Second Injury Fund, Respondent was awarded the difference between the rate for permanent partial and permanent total disability equaling $99.37 per week from July 26, 2006, and continuing for 60 weeks, and $464.45 per week for Respondent's life thereafter. (L.F. p. 15).

On July 8, 2011, Appellant notified Respondent that although his benefits were to begin to be paid on July 11, 2011, "the SIF is unable to make that payment due to its current balance and projections for the remainder of the fiscal year. We will notify you in the event the SIF is able to make payment in the future." (L.F. p. 26).

Respondent filed a petition for writ in mandamus on September 27, 2011 to collect his workers' compensation benefits. Appellant answered the petition and filed a Rule 52.04(a) Motion asserting that all necessary parties had not been named. Appellant asked the court to add 1,032 current recipients of bi-weekly permanent total disability payments and 148 new permanent total disability awardees who had not been paid. (L.F. p. 32). There are approximately 20 new permanent total disability awards received each month. (L.F. p. 67).

On June 21, 2012, the trial court concurrently conducted a hearing on the Treasurer's Rule 52.04(a) Motion and on Skirvin's Petition. Cindy Struemph ("Struemph"), SIF program manager for the Missouri Division of Workers' Compensation, testified for the Treasurer concerning its financial status.

At the hearing, Ms. Struemph testified that there was $6.5 million in the SIF. (Tr. pp. 12, 26). Ms. Struemph testified that the SIF is funded by a legislatively authorized surcharge ("Surcharge") assessed against all workers' compensation insurance policies

and self-insurance coverages as a percentage of each insured's net deposits, net premiums, or net assessments for the previous policy year. The Surcharge was capped by the Missouri General Assembly at 3% in 2005.

The SIF balance on the date of the hearing was sufficient to pay Respondent Skirvin's benefits, but not sufficient to pay all financial obligations. (Tr. p. 26). Ms. Struemph testified that she was not aware of a statute or a case allowing the Attorney General's office the discretion to single out a class of claimants for non-payment of benefits. (Tr. p. 25).

On the date of hearing, Appellant argued its motion to add additional parties to Respondent's writ of mandamus, which the Court overruled. (Tr. pp. 4 and 37). In granting Respondent's writ of mandamus, and in reference to permanently and totally disabled awardees against the Second Injury Fund, the Trial Court stated: "And these are people that obviously need their money. I mean, this is an embarrassment to the State of Missouri that we do not have adequate funds to pay people that were injured while they were doing hard work. And something needs to be done to remedy the situation." (L.F. p. 87).

STANDARD OF REVIEW

The standard of review of the trial court's grant or refusal of a writ of mandamus is abuse of discretion. State v. Missouri State Treas., 182 S.W.3d 638, 640, 641 (Mo.App. 2005). "The trial court abuses its discretion when its ruling is clearly against the logic of the circumstances then before the trial court and is so unreasonable and arbitrary that the ruling shocks the sense of justice and indicates a lack of careful deliberate consideration."

Oldaker v. Peters, 817 S.W.2d 245, 250 (Mo. banc 1991) (citation omitted). "[T]he trial court necessarily abuses its discretion where its ruling is based on an erroneous interpretation of the law." Bohrn v. Klick, 276 S.W.3d 863, 865 (Mo. App. W.D. 2009).

ARGUMENT

POINT I AND II

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION, OR ERR AS A MATTER OF LAW, IN GRANTING RESPONDENT'S WRIT OF MANDAMUS COMPELLING PAYMENT OF A JUDGMENT ON A FIRST COME/FIRST SERVED BASIS WHERE THE STATE IS THE ENTITY THAT CREATED THE SIF AND CONTROLS ITS FUNDING MECHANISM, WHERE THE SIF HAS SUFFICIENT FUNDS TO PAY RESPONDENT'S JUDGMENT, AND WHERE THE STATE OF MISSOURI HAS THE POWER AND ABILITY TO ACQUIRE RESOURCES TO PAY ALL CLAIMS.

Respondent addresses Appellant's points I and II collectively and point III separately. Appellant's first and second points on appeal argue that Appellant Missouri State Treasurer (Appellant) and the Director of the Division of Workers' Compensation (Director), cannot be compelled by mandamus to pay Respondent's judgment on a first-come/first served basis where the SIF is unable to pay all present and future awards because it interferes with their quasi-judicial authority and because it is against public interest.

It is uncontested that Skirvin holds a final judgment against the SIF. The Labor and Industrial Relations Commission (LIRC) issued an Award on May 6, 2011, in favor

of Respondent for permanent total disability benefits against the SIF. §287.480 RSMo (L.F. pp. 11-25). The award was not appealed and became final on Monday, June 6, 2011, thirty (30) days after the date the award. (§287.495.1 RSMo). The SIF refused to pay and Respondent filed a petition in mandamus to collect his judicially determined workers' compensation benefits.

The only specific judicial guidance provided to injured workers on how to collect money that is owed from the State and, in particular, from the Second Injury Fund is found in Otte v. Missouri State Treasurer, 141 S.W.3rd 74 (Mo.App. E.D. 2004), ("Otte II"). In Otte II, the plaintiff attempted to collect benefits he was owed from the Second Injury Fund through a traditional execution under RSMo Chapter 513. (Id. at 75). The Missouri State Treasurer, as custodian of the Second Injury Fund, moved to dismiss the case, arguing that the Legislature had not waived sovereign immunity in the case of executions. Id. The Treasurer's motion was denied and the state appealed. Id.

The Appellate Court agreed with the Treasurer and reversed the ruling of the Trial Court, remanding with directions to quash the application for execution. (Id. at 76). However, in a footnote, the Otte II Court stated that "the preferred means to collect money clearly owed by the State is mandamus." (Id.). The plaintiff then proceeded according to Otte II, filing a writ of mandamus to secure payment of benefits. State v. Missouri State Treasurer, 182 S.W.3d 638 (Mo.App. 2005).

Respondent's writ of mandamus follows the Otte Court's directive and satisfies Missouri's stringent, well-established requirements. 1) The LIRC's Award established in Respondent Skirvin a clear, unconditional, legal right to permanent total disability

benefits pursuant to Missouri's Workers' Compensation Law. (§287.220 RSMo); State v. Missouri State Treasurer, 182 S.W.3d 638, 641 (Mo. App. E.D. 2005) ("Otte II") (citing State ex rel. St. Joseph Hospital v. Fenner, 726 S.W.2d 393, 395 (Mo. App. W.D. 1987). 2) The purpose of the Respondent's writ is to collect from the SIF benefits the LIRC has previously adjudicated. Otte v. Missouri State Treasurer, 141 S.W.3d 74, 76 n. 3 (Mo.App. E.D. 2004). 3) Appellant and the Director have a present, imperative, unconditional, and ministerial duty to pay Respondent permanent total disability benefits in accordance with the LIRC's Award. (Section 287.220 RSMo), State v. Missouri State Treasurer, 182 S.W.3d 638, 641 (Mo. App. E.D. 2005). 4) Respondent's writ of mandamus does not seek to control the judgment or discretion of the Appellant or the Director because Section 287.220.1 RSMo describes a ministerial duty to pay benefits not a discretionary duty to pay awards. Id. (quoting State Bd. of Health Ctr. v. County Comm'n., 896 S.W.2d 627, 631 (Mo. banc 1995), Jones v. Carnahan, 965 S.W.2d 209, 213 (Mo. App. W.D. 1998).

Appellant makes two basic arguments against Respondent's right to mandamus compelling payment of his full benefit where the SIF lacks sufficient funds on hand to pay all claims. One argument is that payment of Respondent's benefits infringes upon the "quasi-judicial" discretion of the Director of the Division of Workers' Compensation to determine the order and priority of SIF payments. The second argument is that payment through mandamus is against the "public interest."

In regard to "quasi-judicial" argument, whether Appellant or the Director has any discretionary authority to pay SIF awards depends upon an examination of Section

287.220.1. (see, Jones v. Carnahan, 965 S.W.2d 209, 213 (Mo. App. W.D. 1998). The 2005 amendments to Missouri's Workers' Compensation Law mandated that the statute be strictly construed. Mo. Rev. Stat. section 287.800 (2005).

> Strict construction means that a statute can be given no broader application than is warranted by its plain and unambiguous terms. The operation of the statute must be confined to matters affirmatively pointed out by its terms … . A strict construction of a statute presumes nothing that is not expressed.

Robinson v. Hooker, 323 S.W.3d 418, 423 (Mo. App. W.D. 2010). Appellant's and the Director's duties under the statute to pay workers' compensation awards, and the obligation to pay all benefits that are due, is clear. Not only is the obligation to pay benefits, but the obligation to pay all benefits due. Section 287.220.1 RSMo. (2005) provides that "upon the requisition of the Director of the Division of Workers' Compensation, warrants on the State Treasurer for the *payment of all amounts* payable for compensation and benefits out of the Second Injury Fund *shall* be issued." (emphasis added).

The plain and unambiguous terms of the statute grants Appellant no discretion. The Director is similarly afforded no discretion to determine whether to requisition payment of a SIF award. Requisitioning payment is a mere ministerial step. See, e.g., State ex rel. Hufft v. Knight, 121 S.W.2d 762, 764 (Mo. App. 1938). (holding school district "owes the duty to pay an obligation established by judgment against it" which is a

duty which "results from the plain moral as well as the legal obligation of a municipality or district to pay its debts and no discretion within the legal limitation of the performance of the duty can rightfully be claimed or exercised"). The SIF's lack of funds on hand to pay all claims neither alters the nature of Appellant's or the Director's ministerial obligations under the statute nor does it grant additional quasi-judicial powers.

Appellant cites Section 287.710.5 as some justification for a statutory grant of discretion because it states a duty to "sacredly safeguard" the SIF. Read in context, this portion of the statute does not convert the ministerial duty to pay claims to a discretionary one based on the financial condition of SIF. Rather, the phrase "sacredly safeguard and preserve" simply mandates the purposes for which SIF funds can be used, to the exclusion of all others. This section controls what the SIF can be used for and not when funds awarded for an appropriate purpose should be paid.

Secondly, Appellant argues that because the SIF lacks sufficient funds on hand to pay all claims, it is against the "public interest" to pay Respondent's benefits on a first come/first served basis where other awardees still remain without benefits. To support his position, Appellant relies on State ex rel. Sturdivant Bank v. Little River Drainage District, 68 S.W.2d 671 (Mo. banc 1934), and State ex rel. Drainage District. No. 8 of Pemiscot County v. Duncan, 68 S.W.2d 679 (Mo. banc 1934). Both cases involved Depression era drainage districts that had insufficient funds on hand to pay both matured bonds and future bonds as they came due. In these cases, the Supreme Court held that writs in mandamus could not compel payment from a government entity, even if

sufficient funds on hand were sufficient to pay Relator, if the districts lacked the legal authority to replenish its funds to pay all claims. Sturdivant, at p. 675; Duncan at 683.

If the government entity could replenish its funds to pay all claims, these cases followed the general rule that mandamus can compel payment on a first come/first served basis. 55 C.J.S. Mandamus, section 198, pp. 268-69. Stated more completely, the general rule is as follows:

A lack of funds is not a legal excuse for failure of a public officer or body to carry out a particular policy if the officer or body has the power to levy taxes and issue obligations for necessary purposes." 55 C.J.S. Mandamus, section 20, p. 19. Mandamus may issue to compel payment of a claim out of a fund which is sufficient and available therefore, even though the fund may be insufficient to pay all claims which are ultimately payable therefrom, and in such case, in the absence of a statute providing otherwise, the so-called, "first come, first served" rule generally determines priorities. Furthermore, in order for the rule to apply, there must be an inexhaustible fund the debtor can replenish, as by taxation, and the creditor excluded from sharing in the fund on hand must be entitled to require the debtor to exercise its taxing power for their benefit. 55 C.J.S. Mandamus, section 198, pp. 268-69 (emphasis added).

This general rule supports payment in full of Respondent's benefits, not a rateable share.

The error of Appellant's reliance on these cases is equating the SIF --an account, or journal entry-- with the drainage districts-- entities that lack the ability to replenish funds to pay financial liabilities. It is clear from Sturdivant and Duncan that the relevant

analysis is focused on the solvency of the public entity and the ability of that entity to replenish funds. A fund or an account can't make payments or replenish itself. A fund is not an entity but is, instead, a source of funds controlled by an entity. Mandamus is not directed at an account or fund; it is directed at a public entity or official.

Section 287.220, in pertinent part, describes the SIF as an account: "All cases of permanent disability where there has been previous disability shall be compensated . . . . out of a special fund known as the second injury fund hereinafter provided for. . . . The state treasurer shall be the custodian of the second injury fund *which shall be deposited the same as are state funds* and any interest accruing thereon shall be added thereto. . . . (emphasis added). The SIF is merely a source of funds the state of Missouri uses to effectuate public policy.

If the entity was not the State, but the SIF itself, then Respondent could recover the benefits he is owed through a traditional execution under RSMo Chapter 513. Otte II, at 75. It is clear from an examination of the history of Missouri's Workers' Compensation law that the State is the entity whose solvency is relevant to the analysis. Missouri abrogated common law remedies for workplace injuries, and defenses to those remedies, adopting a statutory workers' compensation system in 1925. See, e.g., Section 3317 RS 1929; Section 3709 RS 1939. Where applicable, the statutory workers' compensation law supplants and supersedes rights and remedies a worker might have had at common law, and those rights and remedies become exclusive. State ex rel. Tri-County Elec. Co-op. Ass'n v. Dial, 192 S.W.3d 708, 710 (Mo. banc 2006). One aspect of this statutory system was the right of a worker to compensation for pre-existing disability

where an additional work-related disability occurs. See, e.g., Section 3317 RS 1929; Section 3709 RS 1939. The combined effect of the preexisting disability and the last work injury (second injuries) were initially the liability of the employer. Id.

The employer's responsibility to compensate employees for second injuries shifted to the state of Missouri in 1951 when the General Assembly created the SIF. 287.220.1 RSMo Cum.Supp. 1951. The SIF became the employee's exclusive remedy for second injuries. Id. SIF liability is recognized as separate and distinct from the liability of an employer or insurer. Tiller v. 166 Auto Auction, 65 S.W.3d 1, 5 (Mo. App. S.D. 2001).

The State created the SIF in order to effectuate the desired public policy to "assist in the continuing fight against the unemployment of those who are sufferers of some disability at the time of their employment." James B. Slusher, The Second Injury Fund, 26 Mo. Law Rev. 328, 328 (1961). The basis of the SIF rested, in part, on the belief that "a job applicant will not be hired if an employer would be responsible for any disability not specifically suffered while in employment of that particular employer." Id.

"The purpose of the fund is to encourage the employment of individuals who are already disabled from a preexisting injury, regardless of the type or cause of that injury." Pierson v. Treasurer of State, 126 S.W.3d 386, 390-91 (Mo. banc 2004). "The fund relieves an employer or his insurer of the responsibilities of liability to an employee for any disability which is not specifically attributable to an injury suffered while in the employment of that particular employer." Slusher, supra at 328. The workers' compensation law has been referred to as a "bargain" in which the employer forfeits common law defenses and assumes liability for workplace injuries and the employee

forfeits the right to a potentially higher common law judgment in return for swift and assured compensation. Mo. Alliance for Retired Ams. v. Dep't of Labor & Indus. Relations, 277S.W.3d 670, 675 (Mo. banc 2009).

From the SIF's inception until 2005, Missouri's General Assembly modified the SIF funding mechanism to adequately cover liability. For example, the General Assembly has periodically increased authorized assessments or Surcharges allocated to the SIF, and has required annual reports and periodic actuarial studies intended to "determine the solvency... [and] appropriate funding level of the fund," and to "make budget requests for payments from the second injury fund." Sections 287.220.6 RSMo Cum. Supp. 1987 and 287.715. Over the years, Missouri's General Assembly has demonstrated, and implemented, the power and ability to acquire the resources to pay all SIF claims in order to serve its statutorily stated objective to make "effective the law to relieve victims of industrial injuries from having individually to bear the burden of misfortune or becoming charges upon society." Section 287.710.5.

Because the solvency of the "entity" in this case is the state, Respondent's writ of mandamus must be paid even though the SIF does not have sufficient funds on hand to pay all claims. It is admitted that it has funds sufficient to pay Respondent's judicially awarded benefits. The State of Missouri's power and ability to replenish the SIF is shown throughout the history of the Fund. Based on the Depression era cases and the general rule governing writs in mandamus, the trial court's grant of Respondent's writ of mandamus, compelling payment of his full benefit, must be affirmed.

Additional comment is important concerning the reason the SIF lacks sufficient funds on hand to pay all of its liability. In 2005, the General Assembly imposed a three percent cap on the Surcharge used to fund the SIF. 287.715.2 RSMo Cum. Supp. 2005. The General Assembly intentionally underfunded the SIF with the knowledge that the 3% cap on the Surcharge would not meet its liability and "would be periodically deficit in FY 2007. (see attached, p. 6). In 2007, then Governor Blunt requested an audit of the SIF to determine its solvency in light of the 3% cap and the Schoemehl case that had been recently decided by this Court. The audit, by Missouri State Auditor Susan Montee, predicted that the "2005 legislative change to the workers' compensation law capping the fund surcharge rate at 3 percent limits the DOLIR's ability to generate revenues sufficient to cover fund expenditures."

If Appellant's argument is persuasive, Respondent has been left with no recourse and no remedy. Respondent's common law remedies are not available because of Missouri's exclusive statutory remedy. Respondent's exclusive statutory remedy is not available because the General Assembly intentionally underfunded the SIF. Respondent cannot compel payment of his workers' compensation benefits through mandamus because the SIF does not have enough funds to pay all of its liability due to the 3% cap. Extinguishing Respondent's common law and statutory remedy is contrary to the "open courts" provision of Missouri's Constitution, article 1, section 14, which states:

That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.

This provision prevents the government from arbitrarily or unreasonably barring or interfering with the peoples' ability to enforce recognized causes of action for personal injury. Kilmer v. Mun, 17 S.W.3d 545, 549 (Mo. banc 2000). It has been referred to as a "second due process clause to the constitution." Goodrum v. Asplundh TreeExpert Co., 824 S.W.2d 6, 10 (Mo. banc 1992). Frequently this "open courts" provision is thought of in the context of preventing government from unreasonably abrogating or altering a common law cause of action. See, e.g. State ex rel. Cardinal Glennon Mem'l Hosp. for Children v. Gaertner, 583 S.W.2d 107 (Mo. banc 1979)

The rights at issue here were created by the legislature. Respondent was awarded benefits pursuant to the exclusive remedy devised and implemented by the legislature. The General Assembly's intentional inadequate funding of the SIF has left Respondent with "no certain remedy."

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION, OR ERR AS A MATTER OF LAW, BY DENYING APPELLANT'S RULE 52.04(a) MOTION TO ADD AS NECESSARY PARTIES 1,180 AWARDEES OF SECOND INJURY FUND PERMANENT TOTAL DISABILITY BENEFITS WHERE APPELLANT DOES NOT HAVE STANDING TO MAKE THE REQUEST TO ADD ADDITIONAL PARTIES, WHERE IT IS NOT FEASIBLE, WHERE COMPLETE RELIEF CAN BE ACCORDED AMONG RESPONDENT AND APPELLANT, AND WHERE NONE OF THE AWARDEES HAVE AN INTEREST IN RESPONDENT'S WORKERS' COMPENSATION BENEFITS.

The trial court denied Appellant's request to add as necessary parties all current Second Injury Fund permanent total disability payees and recipients of permanent total disability awards against the Second Injury Fund since March 7, 2011. (Tr. p. 37). First of all, and most importantly, Appellant and Director do not have standing to request joinder under Rule 52.04(a)(2)(i). Rule 52.04 tracts Fed. R. Civ. P. 19 and federal cases construing Rule 19 are instructive. Feinstein v. Feinstein, 778 S.W.2d 253, 256-257 (Mo. App. E.D., 1989). Well established is that under Federal Rule 19's "impair or impede clause" the absent party itself must assert an interest in the subject matter of the pending case." M.C. v. Voluntown Bd. of Education, 178 F.R.D. 367, 370 (D. Con. 1998). In Respondent's Writ of Mandamus, no other creditors of the Second Injury Fund have sought to intervene in this action, and it is not for the state to assert those persons' interests. If Appellant and Director are found to have standing to make this argument, Respondent will address each provision of Rule 52.04 and explain why the judge did not err as a matter of law, or abuse her discretion, by denying Appellant's motion to add additional parties.

As justification for joinder, Appellant points to Rule 52.04(a). (L.F. p. 34). Appellant's argument begins with the portion of the Rule that reads that "a person shall be joined in the action if: (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's interest may (i) as a practical matter impair or impede that person's ability to protect that interest … ." (Appellants' Brief, pp. 8, 9).

Appellant argues that one of the primary purposes of Rule 52.04(a) is to avoid piecemeal litigation and states that a person shall be joined if, in his absence, full relief cannot be accorded to those already parties. In citing Rule 52.04(a), Appellant skips the first consideration of the Rule that non-parties "be joined if feasible." Rule 52.04(a). By their own count, Appellant wants to add a total of 1,328 non-parties to Respondent's Writ of Mandamus. Added to that number would be the approximately twenty new awards against the Second Injury Fund each month.

Pragmatic considerations to join nonparties do matter. The trial court in Missouri Insurance Guaranty Association v. Wal-Mart Stores, Inc., 811 S.W.2d 28, 33 (Mo.App. E.D. 1991), rejected a request by Wal-Mart to join all of its employees in a lawsuit by the Missouri Insurance Guaranty Association (MIGA), seeking a declaratory judgment that MIGA was entitled to recover amounts it had paid on Wal-Mart's workers' compensation claims that its insolvent carrier had failed to pay. Wal-Mart's theory was that its employees had an interest in the case because no one knew "if Wal-Mart is presently solvent or will continue to be solvent." Id. The Court of Appeals characterized Wal-Mart's argument as "somewhat incredible," and declined to "speculate on the future viability of Wal-Mart." (Id., at 34). Like Wal-Mart in the above-referenced case, Appellant's request that over 1000 persons be added to this Writ of Mandamus is "somewhat incredible," and not feasible.

Issues of feasibility to add over 1000 non-parties to this case are overwhelming. Nowhere in the record, or in their argument, does Appellant or Director identify how, in a practical matter, that these individuals could possibly be added. A short list of

feasibility issues would include identifying these persons and determining their desire to participate; once added, how would each party be contacted concerning court dates, orders or case status; who would bear the cost of contacting all parties; would discovery be necessary, and if so, would each party bear their own cost for court reporters, travel, etc.; would each party need legal representation; could any party proceed *pro se*? Additionally, this class of individual would not be finite because twenty new awards against the Second Injury Fund are added each month. (Tr. p. 17). Respondent and Appellant would be back in court each month adding new parties to this Writ of Mandamus with no end in sight.

Appellant's argument under Rule 52.04(a)(1) must fail because complete relief can be accorded among Respondent Skirvin and Appellant without the presence of any other individual SIF permanent total awardees. The amount of workers' compensation benefits that the Second Injury Fund owes Respondent is found within the four corners of the Labor and Industrial Relations Commission's Final Award allowing compensation. (L.F. pp. 11-15). Whether the Second Injury Fund can pay its entire obligation to others is not the subject of this Writ, nor does Respondent have standing to enforce the rights of all the workers who are entitled to benefits. Appellant's evidence was that there was enough money in the Second Injury Fund to pay Respondent's past due benefits. (Tr. p. 26). Furthermore, Appellant and Director posted a cash bond that covers the Second Injury Fund's obligation to Respondent for past benefits, and future benefits for a year, plus interest.

Appellant's argument must fail under Rule 52.04(a)(2) because none of the persons Appellant would like to add have a claim in the subject of Respondent's Writ of Mandamus –Respondent's workers' compensation benefits. Respondent's Writ asked for the trial court to order the Director of the Division of Workers' Compensation to request, and the Missouri State Treasurer to pay, workers' compensation benefits owed to him pursuant to an Award of the Missouri Labor and Industrial Relations Commission. (L.F. pp. 7-26). None of the current recipients of permanent total disability benefits, or any recipients of permanent total disability awards since March 7, 2011, are entitled to Respondent's benefits as defined in Award No. 06-047647. Because no other person has an interest in Respondent's benefits, there is no one to be added to Respondent's Writ of Mandamus under the Rule.

Appellant's argument under Rule 52.04(a)(2)(i) fails, as well. Resolution of Respondent's Writ of Mandamus is to enforce payment of his benefits only, consequently no non-party has an interest in the action to "impair or impede."

Consequently, the trial court did not err in applying the law or abuse its discretion in denying Appellant's motion to add necessary parties. It is clear that Appellant and Director do not have standing to raise the argument. No nonparties have an interest in Respondent's Workers' Compensation benefits and complete relief can be afforded between the parties in this case if Appellant would pay Respondent the workers' compensation benefits that he is owed. Additionally, no abuse of discretion exists or err in applying the law, where adding an infinite number of parties, now totaling over 1000 and increasing by 20 each month, is not feasible.

CONCLUSION

The trial court did not abuse its discretion, or erroneously declare or apply the law, by denying Appellant's Motion to Add Necessary Parties pursuant to Rule 52.04. The first consideration of the rule -feasibility- is not satisfied. Appellant discusses in this brief the impossibility of adding over 1000 non-parties to this case. Managing notice, costs, discovery and legal representation of a potentially infinite class of awardees would not lead to resolution of the legal issues in this case. No other person that Appellant wants to add to this case has any interest in Respondent's workers compensation benefits. No other parties are required because complete resolution can be obtained between Appellant and Respondent if his workers' compensation benefits are paid.

Most importantly, the trial court did not abuse its discretion, or erroneously declare or apply the law, by granting Respondent's Writ of Mandamus. Respondent's writ of mandamus compelling payment of his permanent total disability benefits on a first come/first served basis is not against public interest. The SIF has the funds to pay these benefits and the state of Missouri has the power and authority to adequately fund the SIF to meet its intended purpose: to make "effective the law to relieve victims of industrial injuries from having individually to bear the burden of misfortune or becoming charges upon society." Section 287.710.5.

The General Assembly's deliberate lack of funding the SIF takes an exacting toll on Respondent who is subject to the SIF's exclusiveness. Respondent Skirvin suffers financial hardship, emotional strife that accompanies uncertainty, and indignity of having worked all his life to be the recipient of Missouri's broken promise. This broken promise

leaves Respondent Skirvin with no common law remedy, no statutory remedy, and no civil recourse.

The law applicable to this case is clear. Substantial evidence supports the judgment of the trial court and it is not against the weight of the evidence. The trial court's judgment granting Respondent's writ of mandamus must be affirmed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, and for his Certificate of Compliance states that Respondent's Brief complies with the limitations contained in Rule 84.06(b) and contains 5,482 words, and meets all requirements of Rule 55.03.

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CERTIFICATE OF SERVICE

I hereby certify the a true and complete copy of the foregoing was filed electronically via Missouri CaseNet and notice of the electronic filing was provided via that system on this 22nd day of March, 2013 to Mr. Ronald R. Holliger, Attorney for Appellant, PO Box 899, Jefferson City, Missouri 65102.

/s/ Andrew H. Marty
Attorney for Respondent